Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 79 - 2056

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

* * *

JAMES F. MILLER

Petitioner

V.

TEXAS STATE BOARD
OF BARBER EXAMINERS

Respondent

* * *

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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QUESTION PRESENTED

Whether a legitimate nondiscriminatory firing can be the basis for Title VII relief if the conditions of employment are arguably different for whites and blacks.

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TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES the Texas State Board of Barber Examiners, Respondent herein, and files this its brief in opposition to petition for writ of certiorari filed by Petitioner, James F. Miller.

STATEMENT OF THE CASE

James F. Miller, Petitioner, was employed by Respondent, Texas State Board of Barber Examiners, in 1965. He worked as an undercover investigator for four years investigating barber shops owned by both blacks and whites. In 1969, Petitioner was promoted to the position of inspector. At this time Respondent

employed twelve inspectors, all white, who were afraid to inspect shops operated by black persons because of racial tension and fear of physical violence. For this reason, Petitioner was told that he would primarily inspect shops operated by blacks although he also occasionally inspected shops operated by both Mexican-Americans and whites.

Petitioner's initial assignment was in the Fort Worth and Dallas area. He was not assigned a specifically drawn geographical district but never complained about this during his term of employment. He did, however, complain that he did not have enough work to keep him busy throughout the month; as a result, Waco was added to his inspection area. He was also sent to Houston on occasion to inspect barber shops in that city.

In 1973, Respondent became dissatisfied with Petitioner's work. The record reveals that this was primarily because he was making unauthorized inspections outside his normal geographical area of operation. These unauthorized inspections were putting a strain on the Board's limited budget because reimbursement for travel expenses and per diem were paid whenever an inspector was required to work outside his normal area. Even after having been reprimanded for this practice, Petitioner persisted in making unauthorized inspections. The Board was also dissatisifed with the quality of Petitioner's inspections. In order to give Petitioner a chance to rehabilitate himself, the Board decided to transfer him to Houston. Petitioner was informed of the Board's decision by his supervisor in early September and told to begin work in Houston on October 1, 1973. He neither followed these instructions nor did he tell his supervisor that he did not intend to follow them. When Petitioner's supervisor asked him on October 1 why he was not working in Houston, Petitioner replied that he had no comment to make. The Board discharged him shortly thereafter.

In November of 1973, Petitioner requested and was

given a hearing concerning his claim of a racially motivated discharge. Respondent, after considering testimony and argument of counsel, refused to reinstate him. Both the district court and the court of appeals found that Petitioner was discharged for a legitimate, nondiscriminatory reason, the failure to report to work in Houston. This fact was clearly established by the evidence.

REASONS FOR DENYING WRIT

1. Petitioner urges the Court to hear this case along with *Burdine v. Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3814 (U.S., June 16, 1980)(No. 79-1764). In so urging, Petitioner contends that Respondent failed to give reasons why (1) Petitioner was not allowed to inspect barber shops operated by whites, and (2) Respondent transferred Petitioner to Houston. The record, however, indicates that Respondent introduced evidence on both issues.

First, Petitioner was not forbidden to inspect white barber shops and, in fact, upon occasion did so. Second, Respondent introduced evidence showing that Petitioner was to be sent to Houston to be given a chance to rehabilitate himself because Respondent was dissatisfied with some of Petitioner's work habits. This evidence was weighed by the two lower courts and judged accordingly. The question of who bears the burden of proof in a Titel VII case is not an issue where the facts are virtually undisputed and the Respondent carried the burden under even the most rigid test. As was stated by this Court in *Graver Manufacturing Company v. Linde Company*, 336 U.S. 271 (1948), "a court of law, such as this Court is, rather than a court for correction of errors in fact finding,cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Neither Petitioner nor the record demonstrates

such error. Respondent demonstrated, and the record reflects, that transfers within the state were customary. Nowhere does it appear that this transfer was motivated by racial considerations.

2. Both courts below, after giving full consideration to the issues presented by the evidence, were correct in finding that Petitioner's termination by Respondent was based solely on Petitioner's insubordination. He failed to report to work in Houston as ordered. He gave no advance warning; he offered no explanation. Petitioner was treated as any other employee who failed to report to work. He was not treated differently because of his race.

The evidence adduced at trial indicated that Vernon Plantt, a white inspector, was transferred at the same time and for the same reasons as Petitioner. Plantt's case varies only in that he reported to his new assignment for two weeks before returning to the city of his previous assignment. When it became clear that Plantt, like Petitioner, was refusing to be transferred, he was terminated. Thus, the treatment of a white person employed by Respondent in no way differed from the treatment of Petitioner. Any differences in the procedures followed in terminating the two men were a result of Vernon Plantt's initial compliance with Respondent's instructions. With respect to discharge for violation of work rules, a Title VII claimant must demonstrate in order to make his prima facie case that either he did not violate the rule or that if he did, white employees who engaged in similar acts were not similarly punished. *Green v. Armstrong Rubber Company*, 612 F.2d 967 (5th Cir. 1980). Petitioner failed to demonstrate that disparity of treatment occurred in the circumstances surrounding his discharge.

3. Petitioner also contends that this Court should hear this case because it is shocking that a person who has been racially discriminated against cannot obtain a

redress of the matter because he failed to complain. Under Tital VII, only eq··itable relief is available. Civil Rights Act of 1964, §701, *et seq.*, as amended, 42 U.S.C. §2000e, *et seq.* Absent any showing of a wrongful discharge based on racial discrimination, reinstatement is inappropriate. Even assuming that the assignment of Petitioner to primarily inspect barber shops operated by blacks was not justified by business necessity, the record shows that Petitioner received pay and benefits identical to those of white inspectors. Thus, an award of back pay is inappropriate. Injunctive relief is not appropriate because this is not a class action and because Petitioner, who was terminated for a valid, nondiscriminatory reason, is no longer an employee of Respondent. Petitioner has failed to demonstrate an injury that can be remedied by his Title VII suit.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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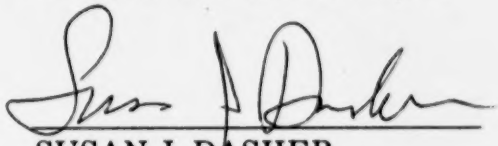

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